The Central Law Journal.

ST. LOUIS, JULY 15, 1881.

CURRENT TOPICS.

An article in the July number of the *Atlantic Monthly*, entitled, "Trial by Jury in Civil Suits," is worthy of notice and comment, both because of the established reputation of the medium in which it is presented to the public, and because it embodies in the arguments there advanced, the customary popular objections to the institution. After sketching the origin of trial by jury, the author proceeds to argue its inferiority to trial by the court, as a method of determining controversies, from (1) its less capacity for the work to be done; and (2) from its greater accessibility to improper and corrupt influences. He thinks that the jury has less capacity for the determination of controversies, because jurors have not been trained for the work which they are required to do; that we are not accustomed to go to our shoemaker for a coat, nor to our tailor for boots, that the world's work can not be done without special preparation for special duties. And then again, he thinks that, as the juror is impressed into service, he brings with him the cares and anxieties of his own business, by which his attention is distracted from the questions in the case before him. That, on the other hand, the judge brings to the labor of determining controversies, a mind disciplined by years of study, followed by years of study and practice; that the duties of his office are his work, and his attention is not distracted by outside cares.

He considers the jury more accessible to improper motives than the judge, because of the difference in their relative inducements to fidelity. He assumes that the highest motive, their sense of duty, will be equal. Aside from this, he thinks the individual juror is more apt to yield to temptation, because he neither wins nor loses good name or fame by the verdicts of a tribunal of which he is only a twelfth part; he gives no reasons for his decisions, and may, without restraint or censure, act from pique, prejudice or sympathy. The judge, on the other hand, has a reputation to make or mar; usually he gives reasons for his decrees, and the law may require him always to do so; he alone is responsible, and he can not afford to be negligent or hasty. As to the liability of a jury to corruption, the author thinks that bald bribery is rare because perilous; but that the wide range of subtle and effective influences which are so well known to the lobbyist, can be as easily employed to influence a jury as a legislative committee; that the material of which our juries are composed renders it at least probable that frequently some one of the twelve may be found controllable by other means than those used in the presence of the court. That judges are free from such influences, he thinks is demonstrated by the history of the English bench, from the day they became independent of the crown, and of our own, where the life tenure has been preserved.

These, in brief, are some of the views expressed in the article in question; we venture to differ from them. As to the lack of special training on the part of the jury for its work, while we are not at all inclined to disparage the value of specialization and the division of labor as a method of accomplishing great results in many departments of industry, we question whether the principle can be of any real utility in the determination of questions of fact in the administration of justice. The infinite variety of questions of fact, which arise for decision in courts of justice require for their solution, not so much the trained capacity of any particular calling, even of the calling of making such investigations, as the practical common sense of daily life. It is perfectly well known to observers of the bench and bar, that judges not unfrequently become cranky, technical and liable to fly off at a tangent. Many judges too, notwithstanding their office, are by nature, advocates, and snuff a contest from afar off, and will perfectly unconsciously assume one side or the other of every case which is brought before them, from the beginning of the trial. It is a weakness of their natures, not to be remedied, because they are all the while unconscious of any such tendency.

It is, however, not so intolerable under the present system, because, as the judge decides only questions of law, it is possible for the practitioner to bring him to book, by con-

fronting him with adverse authorities, and in addition there remains the remedy by appeal or writ of error. But the determination of a court sitting as a jury upon matters of fact is final, and if the court indulges in impractical crotchets there is no remedy for the injustice. The best disciplined minds, as far as the discipline of study is concerned, are not always the best minds for the settlement of questions of fact. The intelligent business man, or mechanic is more capable as a rule of saying, in the face of conflicting evidence, whether or not John Smith's alleged signature is or is not a forgery, than the most eminent judge could be. The knowledge needed for such work, is the knowledge of the world, the training of daily life.

The objection that the juror's attention is liable to be distracted, by anxiety about his own affairs, from the attention to which he has been forced by summons to this public duty, we consider of trifling importance. In the great majority of cases, if the juror's affairs are really so pressing as to require his attention, he is readily excused by the court. In any event there will in no case be found, we fancy, a whole jury who are so absorbed in their own affairs, as to fail in attention to the case on trial.

Nor do we believe that in those States where there is a sensible jury-law, so enforced as to reduce the tramp juries to a minimum, and to bring out the substantial portion of the community as much as possible, juries will be found more accessible to corrupt influences than judges. Those judges whose tenure of office is for life are, it is true, to a certain extent placed above temptation, but such judges are the exception in this country, including only the Federal judiciary and the judiciary of a very few States. And any reform in this matter, in those States where they are elected by the people and for a short term of office, is, we believe, impracticable.

The greatest safeguard of the system is the fact that the juror is unknown until he comes into the court room to try the cause. No very elaborate means of controlling his opinions can be taken. No subtle influences can be thrown around him in his home life, in his business and among his associates upon the street, because of the lack of time and opportunity. Besides there are twelve of him to be influenced, each one of whom will be subject to distinct and different influences. If, however, questions of fact were to be irrevocably determined by the judge, a single individual, holding his office as a permanency, we believe that among the great corporations and bnsiness concerns, there are litigants who would find it to their interest to build up a system of pernicious influences around such judges as were susceptible of control, and to prevent the re-election of such as were found to be incorruptible. The trouble with the great majority of utterances which we have seen on this subject, is the fact that they ignore the imperfection of human nature, and of all human work. No system devised by man can administer perfect and exact justice. The utmost that can be done (until some means are discovered which will enable a tribunal to read the motives and dive into the secret thoughts of witnesses, parties and counsel, as well as to keep itself unspotted by prejudice or passion), is to approximate justice. A system which is reasonably good in practice should not be disturbed except for glaring defects and upon the strongest grounds.

DOWER UNDER LEGISLATION.

Dower is that provision which the law makes for a widow out of the lands or tenements of her husband.[1] It is not derived from, nor is it dependent on any contract.[2] Distinction must be observed between the contract of marriage and the marriage itself; it is from the marriage as a *status* that the law confers dower as an incident.[3] "It will be observed," says Baron Park,[4] "that this estate of dower arises solely by operation of law, and not by the force of any contract, expressed or implied, between the parties; it is the silent effect of the relation entered in by them, not as in itself incidental to that relation, or as implied in the marriage contract,

[1] Schouler Dom. Rel. 183; 1 Wash. Real Prop.* 147.
[2] 1 Wash. Real Prop.* 204.
[3] Noel v. Ewing, 9 Ind. 38; Melizet's Appeal, 17 Pa. 449.
[4] Park, Dower, p. 5.

but merely as that contract calls into operation the positive institutions of municipal law." Hence, dower is given without regard to the law of the place where the marriage was celebrated.[5] No vested right is conferred by the marriage, but only a capacity to acquire a right.[6] Until abolished by 4 Wm. IV, c. 105, there were only two species of dower in England resulting from contract, these were dower *ad ostium ecclesiæ* and *ex assensu patris*. There is no force, therefore, in the argument sometimes advanced, that the wife acquires a right by the contract of marriage to dower in her husband's lands at his death, which the legislatures can not impair under the Federal Constitution. In the Dartmouth College case, the question of marriage contract was mooted, but Chief Justice Marshall observed that, "The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice."[7] Mr. Bishop speaks of a man who claimed the right to chastise his wife with a rod the thickness of the judge's finger, because such was the law of England when the marriage was celebrated. "Marriage," say the court, in Lucas v. Sawyer,[8] "and the rights incident thereto are public matters to be regulated and governed by law; that the obligations arising are, for the most part, created by public law, and subject to public will, and not to that of the parties."[9] But, of course, it is apparent, that if a vested right is acquired, it is not less within constitutional protection. whether conferred by law or acquired by contract, in the ordinary sense.[10] It remains to be considered at what point the wife's dower rights become vested and beyond legislative invasion. "An estate is vested, when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."[11] "And it would seem, that a right can not be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuence of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another."[12] Until the death of the husband, the wife's right to dower is inchoate; it is not an estate, but a mere contingent claim, not capable of sale on execution, nor subject to grant or assignment.[13] "Dower, inchoate," say the court in Noel v. Ewing,[14] "does not import a vested estate; dower consummate does." In this case the court, after reviewing the numerous changes in the law relating to dower in Indiana, remarks: "The plain and intellegible theory upon which all these changes in the statutes were made and administered was, that the law in force at the death of the husband, when the inchoate claims of the wife become consummate, was the measure of her rights." In Moore v. New York,[15] lands were taken under legislative authority for public use during the life-time of the husband, at his death his widow brought suit for dower; it was held that she could not recover. The court, citing and approving Lawrence v. Miller,[16] observed: "We then held that the wife's right of dower was merely inchoate during the life of the husband, and that she had no vested or certain interest in the lands. The right being merely an incident to the marriage relation, it seems to us that while that right is thus inchoate, and before it becomes vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the legislature to modify or even abolish it." While the authorities are not uniform, their decided weight is in favor of the doctrine that the inchoate right of dower may, at any time before the husband's death, be abridged or entirely taken away, even in those States where the power of dissolving marriages by legislative act is denied;[17] and

5 2 H. Bl. 145; 2 Hogg, 376, n.
6 Cooley Const. Lim. 361.
7 4 Wheat. 629.
8 17 Iowa, 521.
9 Maguire v. Maguire, 7 Dana, 181; Story Conf. of Laws, § 109.
10 Terrett v. Taylor, 9 Cranch, 50.
11 4 Kent Com. 202.
12 Cooley Const. Lim.* 359.
13 Maguire v. Riggin, 44 Mo. 512; 1 Bishop on Mar. Wom. §§ 239, 348; 2 Ibid. § 42; Laurence v. Miller, 2 Comst. 245; Blair v. Harrison, 11 Ill. 385.
14 9 Ind. 42.
15 4 Sandf. S. C. 461.
16 1 Sandf. S. C. 516.
17 1 Wash. Real Prop. * 152; Randall v. Kriger, 2

that the law in force at the death of the husband, determines the widow's rights.[18] Dower is consummate upon the death of the husband; and though the widow has no estate in the lands until dower is assigned,[19] yet her right to dower becomes vested and a subsisting and valuable interest which can not be defeated or affected by legislative act.[20] But the rule that the dower rights of the widow are to be determined by the law in force at the date of the husband's death, is subject to exception. A change in the law can not affect or prejudice the rights of purchasers from the husband; in such case the law in force at the date of the conveyance will govern.[21] A doubt has been suggested to the writer by the case of Ligare v. Semple,[22] whether the law at the date either of the conveyance or death of husband will govern if, after the conveyance, dower should be abolished, although reinstated and remaining on the statute books at the husband's death. The statute in Michigan gave dower to widows of non-residents in such lands only of which the husband died seized; and in Pratt v. Lifft[23] it was intimated that the statute would seem to indicate that the interest of the doweress was to be determined as of the death of the husband, and not of the alienation, and that if she was a resident at the time of his death, she would be entitled to dower in all lands of which he was seized during coverture, although aliened while non-resident; but the court in Ligare v. Semple avoided this result in the following observation: "If a woman is a non-resident at the time her husband conveys absolutely and divests himself entirely of his seizin and estate, there can be nothing for the right of dower to attach to. She is a non-resident, and the estate or seizin can never return."

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Dillon, 444-7; Lucas v. Sawyer, 17 Iowa, 521; Strong v. Clem, 12 Ind. 39; Kennedy v. Mo. Ins. Co., 11 Mo. 204; Moore v. Kent, 37 Iowa, 20; Jackson v. Edwards, 7 Paige Ch. 387; Barbour v. Barbour, 46 Me. 9; Merrill v. Sherbourne, 1 N. H. 214; Melizet's Appeal, 17 Pa. St. 455; 2 Bishop Mar. Wom. sec. 42; Cooley Const. Lim. 361. Doubt is entertained in Dunn v. Sargent, 101 Mass. p. 340; see Westervelt v. Gregg, 2 Kern. 202.

[18] Authorities just cited.

[19] Greenl. Cruise Dig. tit. Dower, ch. 3, §§ 1, 24; Gooch v. Atkins, 14 Mass. 378.

[20] Burke v. Barron, 8 Clark (Iowa), 132.

[21] 2 Scrib. Dow. 22; Moore v. Kent, 37 Iowa, 21; Craven v. Winter, 68 Iowa, 474; Given v. Marr, 27 Me. 212; Curtis v. Hobart, 41 Me. 230; Hopkins v. Frey, 2 Gill. 360; McCafferty v. McCafferty, 8 Blackf. 218; Litton v. Askew, 66 N. C. 172; Hoskins v. Hutchings, 37 Ind. 324.

[22] 32 Mich. 444. But see Walker v. Deaver, 5 Mo. Appeal, 139.

[23] 14 Mich. 191.

THE RIGHTS AND LIABILITIES OF SUB-AGENTS.

The decision of the Court of Appeal, delivered a short time ago in the case of the New Zealand and Australian Land Company v. Ruston and another, adds very considerably to our knowledge of the rights and duties of sub-agents as regards the original principal. Instances of sub-agency are constantly occurring in almost all the transactions of life. An agent appointed to do something which is properly within the scope of his business, employs another agent to do it for him; a factor or broker entrusted with goods for sale, employs another factor or broker to sell them; a country solicitor, employed by a client in the country to conduct his case, in turn employs a town agent in London to conduct it for him; and so in numberless instances that might be given. Hence, it becomes of the greatest importance to have the rights and liabilities of a sub-agent clearly defined and settled, not only with regard to his own immediate employer, but also with regard to the original principal.

The New Zealand and Australian Land Company v. Ruston and another,[1] was decided in the first instance by Mr. Justice Field. The facts of the case, as brought out at the trial before Mr. Justice Field, were as follows: It was an action brought to recover £2571 8s. 6d., the balance due in respect of corn consigned for sale to the defendants. The plaintiffs were the owners of large estates in New Zealand, and had for many years shipped the produce of their estates to England for realization, and principally on the London market. They had their offices in Glasgow, but had neither office nor agency in London; and the mode adopted by them for the realization of their produce was, for the agents in the colony to ship the wheat

[1] 43 L. T. Rep. N. S. 473; L. Rep. 5 Q. B. 474.

there, and take bills of lading, making it deliverable in London to the plaintiffs. These bills of lading were forwarded from the colony to the office at Glasgow, and the course of business there was, for the plaintiffs' secretary to indorse the bills specially to the firm of Matthews and Thielman, factors, of Glasgow, with instructions, as the agents of the plaintiffs, to sell the goods in London. It was not intended to pass the property in the goods to Matthews and Thielman; they had merely an authority to sell, with the necessary right of possession. Messrs. Matthews and Thielman were both merchants and factors in Glasgow, but it was only as factors, and not as merchants, that they were known to the plaintiffs. The plaintiffs never made any inquiry as to, or in any way trusted or gave credit to, any of Matthews and Thielman's subordinate agents, who might be employed by them for the sales of the plaintiffs' goods. The course of business between the plaintiffs and Messrs. Matthews and Thielman was, for the latter, when any given sales had been effected, to deliver "account sales" in the usual form, debiting all their expenses and commissions, and pay the balance by check after three months. Messrs. Matthews and Thielman, having no house or agency in London, indorsed the bills of lading received by them from the plaintiffs specially to the defendants, who were corn factors and brokers in London, for the purpose of sale by them, and the terms of their employment differed from those upon which the plaintiffs employed Messrs. Matthews and Thielman. The plaintiffs were aware that sales, effected by Matthews and Thielman for them in London, were made by brokers or agents employed by them; but the plaintiffs were in no way parties to these sub-contracts, and the plaintiffs' names were not disclosed upon them; Messrs Matthews and Thielman appearing on the face of them, not as agents for any one, but as principals. The defendants were entrusted with the goods by Messrs. Matthews and Thielman merely for the purpose of sale. They sold the three cargoes (the subject of this suit), and paid the proceeds into their own account with their bankers, in the usual way, mixing up these proceeds with all their receipts from other sources, and, from time to time, made general remittances to Messrs. Matthews and Thielman on account of them, but the defendants' books showed the amount received and paid in respect of each particular cargo. The defendants admitted the fact of the sales, receipt of the proceeds, and the amount of the balance; but defended themselves by alleging that they had acted under the employment of, and received the proceeds for the account of, Messrs. Matthews and Thielman, and not of the plaintiffs; and that there was no such privity of contract between them and the plaintiffs, as to make them liable to the plaintiffs, and also sought to set off against the balance claimed, money due to them on other accounts from Matthews and Thielman. At the trial the jury found, in answer to two questions left to them by Mr. Justice Field—first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the corn; secondly, that the defendants knew, or had reason to believe, that Matthews and Thielman were acting in these sales as agents for another.

Upon these admitted facts, Mr. Justice Field held that, notwithstanding the first finding of the jury, the plaintiffs were entitled to recover the balance claimed from the defendants, without any set-off in respect of other transactions between the defendants and Matthews and Thielman, and that their right to recover was both as undisclosed principals, and also as being owners of the corn, and, as such, entitled to follow the proceeds of their property, in the hand of the defendants, in their fiduciary character of agents and trustees.

In holding the plaintiffs entitled as undisclosed principals, Mr. Chief Justice Field chiefly relied on the cases of Rabone v. Williams,[2] and Sims v. Bond.[3] In Rabone v. Williams, Lord Mansfield said that where a factor dealing for a principal, but concealing him, delivers goods in his own name, the principal may appeal and bring an action in his own name. This is, no doubt, a sound proposition of law, but it is essentially different from the case to which Mr. Justice Field applied it. It was not the case of one factor being employed to effect a sale, and then, instead of effecting the sale himself, employing on different terms another factor to sell.

[2] 7 T. R. 360, n.
[3] 5 B. & Ad. 389.

The same remark applies to Sims v. Bond. To establish the fiduciary character of the defendants, the learned judge relied on Knatchbull v. Hallett.[4] From this judgment the defendants appealed, and judgment was given by the Court of Appeal on the 28th March by Lord Justices Brett, Bramwell and Baggallay,[5] reversing the judgment of Mr. Justice Field. Lord Justice Bramwell seems to us to have put the matter as clearly as it is possible to be put. Dealing with the question that the plaintiffs were undisclosed principals, Lord Justice Bramwell pointed out the obvious difference between the two cases. He said that in a contract of sale, effected by a broker, the undisclosed principal was entitled to sue, because the broker was employed to make the contract between the principals; while, in the present case, Matthews and Thielman were not employed to make a contract of agency between the plaintiffs and the defendants; they were only employed to make a contract of sale, and, therefore, there was no analogy between the two cases; here, the employment of the sub-agents by Matthews and Thielman was no part of their duty as agents for sale. With regard to the second ground of Mr. Justice Field's judgment, founded on the fiduciary character of the defendants, Lord Justice Bramwell held, that there was no fiduciary relation between the defendants and the plaintiffs; that such relation, if it existed at all, existed between the defendants and Matthews and Thielman. The Lord Justice also held that, although the plaintiffs might have followed the goods themselves in the hands of the defendants, yet here, that the goods had been sold, and the plaintiffs were not entiiled to follow, or claim the proceeds of sale, free from the debts of Matthews and Thielman to the defendants upon other transactions.

Another important case (Crowther v. Ladenburg & Co.) on the subject of the position of sub-agents with regard to the original principal, has also lately been decided by the Court of Appeal, [Bramwell, Baggally and Brett, L.JJ.][6] The facts were these: Crowther, in Cincinnati, being entitled to receive £705 from one Davies, in England, arranges with one Adea, a financial agent in Cincinnati, that he (Crowther) should receive the money from him. Crowther writes to Davies, directing him to pay the money to Ladenburg, the London agent of Adea. Adea writes to Ladenburg directing him to receive the money and to advise him of the receipt. Davies paid the money to Ladenburg, who credited Adea (who owed him money) with it in their books, and wrote to inform him that they had done so. In the meantime Adea had gone into liquidation. In an action by Crowther against Ladenburg for the £705, it was held by the Court of Appeal (reversing the decision of Baron Pollock) that there was no privity between Crowther and Ladenburg; that Ladenburg received the £705 as Adea's agent; and that, consequently, the action could not be maintained. It will be observed here, that the ground of the decision was, that there was no privity or relation between the plaintiff and Ladenburg, for Ladenburg received the money for Adea and not for them. The relation in the transaction was between the plaintiff and Adea, but there was none as between the plaintiff and Ladenburg; and that when the defendant had placed the money to account with Adea, his duty was at an end. In this latter case the defendants relied on the case of Williams v. Deacon,[7] in the Exchequer Chamber, in which the plaintiff's broker, by his direction, was accustomed to pay his dividends into the defendants' bank in London, to the plaintiff's credit in account with K & Co., bankers at Abingdon, where the plaintiff resided. On the 14th of October, 1847, the broker so paid into the defendants' bank £127. On the 15th, and before advice of the receipt thereof, K & Co. stopped payment. The plaintiff, having sued the defendants for the sum so paid into their bank: Held, in the Exchequer Chamber, on exception to the ruling of the judge at the trial, that the payment into the defendants' bank was a payment to K & Co., and that the defendants were entitled to a verdict.

There is another very important case on this subject, viz., the case of Robins v. Fennell,[8] in which a town solicitor, acting as agent for a country solicitor who had been

4 13 Ch. Div. 696.
5 Weekly Notes, April 2.
6 See Notes of Unreported Decisions, L. T. 5th March, 1881.
7 4 Ex. Rep. 39.
8 11 Q. B. 248.

employed in a cause by a client in the country, had received money in the ordinary way as such town agent. In an action for money had and received, brought by the country client, it was held that there was not, in general, such privity between the client and the London agent as entitles the client to recover, for money had and received, against the agent, in respect of proceeds of the cause, which the agent has received in the ordinary course of his business. In giving judgment in this case, Lord Chief Justice Denman says: "The client employs the attorney, is answerable to him for costs, and, in case of negligence or misconduct, must come upon him for redress. * * * * In like manner the attorney employs, and is liable to the town agent, who knows nothing of the client but his name, and is not even to that extent known by him. The town agent could not maintain an action for work and labor against the plaintiff, by whom he was not employed; and the rights and liabilities of the parties in such a case would be reciprocal."

On the whole, the true rule seems to be laid down in Story on Agency:[9] "In regard to the superior or real principal, the general rule of law is, that, if an agent employs a sub-agent to do the whole or any part of the business of his agency, without the knowledge or consent of the principal, express or implied, there, inasmuch as no privity exists in such a case between the principal and the sub-agent, the latter will not be entitled to claim from the principal any compensation for commissions or advances, or disbursements, in the course of his sub-agency. But his sole remedy therefor is against his immediate employer, and his sole responsibility is also to him. But where, by the usage of trade, or the express or implied agreement of the parties, a sub-agent is to be employed, there a privity is deemed to exist between the principal and the sub-agent, and the latter may, under such circumstances, well maintain his claim for such compensation, both against the principal and the immediate employers, unless exclusive credit is given to one of them; and if it is, then his remedy is limited to that pai ty."—*Law Times.*

[9] Page, 474.

PUBLIC OFFICER—RESIGNATION—EFFECT OF, BEFORE ACCEPTANCE.

EDWARDS v. UNITED STATES, *EX REL.*

Supreme Court of the United States, October Term, 1880.

The common law rule that the resignation of a public officer does not take effect or have any validity until accepted by the officer or body to whom it is tendered, or by whom the vacancy is to be filled, or an election for filling it ordered, is still in force in some of the States, and among them in Michigan, and applies to the resignation of a township supervisor tendered to a township board.

In error to the Circuit Court of the United States for the Western District of Michigan,

Mr. Justice BRADLEY delivered the opinion of the court:

William F. Thompson, the relator of the defendant in error, on the 5th day of September, 1874, recovered a judgment in the circuit court of the United States for the Western District of Michigan, against the Township of St. Joseph, in the County of Berrien, in said State, for the sum $17,327.86, besides costs. By the laws of Michigan, an execution can not be issued against a township upon a judgment, but it is to be "levied and collected as other township charges;" and when collected to "be paid by the township treasurer to the person to whom the same shall have been adjudged." Comp. Laws of 1871, sec. 6630. The mode of raising money by taxation in townships is prescribed in secs. 992 and 997 of the Comp. Laws of 1871, which makes it the duty of the township clerk, on or before the first day of October of each year, to make and deliver to the supervisor of the township a certified copy of all statements on file, or of record, in his office, of moneys proposed to be raised therein by taxation for all purposes; and it is made the duty of the supervisor, on or before the second Monday of said month, to deliver such statements to the clerk of the board of supervisors of the county, to be laid by him before the board at its annual meeting. At this meeting the board are required to direct the several amounts to be raised by any township, which appeared by the certified statements to be authorized by law, to be spread upon the assessment roll of the proper township, together with its due proportion of the county and State taxes. The whole is then certified and delivered by the clerk of the board to the town supsrvisors, whose duty it is to make the individual assessment to the various tax-payers of the township in proportion to the estimate and valuation of their property. The assessment roll is then delivered to the town treasurer for collection.

The judgment in the present case not being paid, and the township officers having refused to take any steps to levy the requisite tax for the purpose, the relator, on the 11th of October, 1876,

filed his petition for a *mandamus* against Edward M. Edwards, supervisor of the township of St. Joseph, in which he sets forth the judgment, and alleges that, on the 26th of September, 1876, he caused a certified transcript of the judgment to be served on the township clerk, with proper notice and demand; and on the 27th of September, 1876, he caused a similar transcript, notice and demand to be served on Edwards, the supervisor. The petition further alleged that these officers refused to do anything in the premises, the clerk pretending to have resigned his office. An alternate *mandamus* was issued commanding Edwards, as supervisor of the township, forthwith to deliver to the clerk of the board of supervisors of the county a statement of the claim of relator under and by virtue of the judgment. Edwards duly filed a return, stating that he was not supervisor, and had no authority to perform the acts required of him; that at the general election of April 3, 1876, he was duly elected supervisor, and qualified and entered upon his office, and continued in office until the 7th of June, 1876, when he resigned; that his resignation was in writing, as follows: "To the township board of St. Joseph, County of Berrien, State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7th, 1876. (Signed) Edward M. Edwards." That this written resignation was delivered to and filed by the township clerk on the same day; that since then he, Edwards, had not been nor acted as supervisor, nor had charge of the records nor papers of the office. He further stated in his return, that the township clerk had never delivered to him any certified copy of any statement of the moneys to be raised by taxation, either for the purpose of paying the claim of the relator, or for any other purpose. To this return the relator demurred, and the demurrer was sustained, and a peremptory *mandamus* awarded. The present writ of error is brought to reverse this judgment.

If we could take notice of the affidavits annexed to the petition for *mandamus*, we should not have much difficulty in drawing the conclusion that the pretended resignations of the clerk and supervisor were either stimulated or made for the purpose of evading compulsory performance of their duties. But the return being demurred to must be taken as true, and the affidavits can not be considered. The only question to decide, therefore, is whether the facts set forth in the return exhibit a good and sufficient answer to the alternative write; whether, in other words, they show such a completed resignation on the part of Edwards as amounts to a deposition of his office of supervisor of the township. This is the issue made by the parties, and it is an issue of law. The plaintiff in error insists that having done all that he could do to discharge himself from the office, by filing a written resignation with the township clerk, his resignation was complete. The defendant in error insists that a resignation is not complete until it is accepted by the proper authority. The question, then, is narrowed down to this: Was the resignation complete without an acceptance of it, or something tantamount thereto, such as the appointment of a successor?

As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good goverment, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. See 1 Kyd on Corporations, c. III., sec. 4; Willcock on Corporations, pp. 129, 238, 239; Grant on Corporations, 221, 223, 268; 1 Dillon on Municipal Corporations, sec. 163; Rex v. Bower, 1 B. & C. 585; Rex v. Burder, 4 T. R. 778; Rex v. Lone, 2 Str. 920; Rex v. Jones, 2 Str., 1146; Hoke v. Henderson, 4 Devereux, 29; Van Orsdall v. Hazard, 3 Hill, 247; State v. Ferguson, 31 N. J. 107. This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. "To complete a resignation," says Mr. Willcock, "it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." Will. on Corp. 239.

In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and, in some States, with regard to offices in general, may have obtained; but we must assume that the common-law rule prevails unless the contrary be shown. In Michigan we do not find that any contrary rule has been adopted; on the contrary, the common-law rule seems to be confirmed by the statutes of the State, so far as their intent can be gathered from their specific provisions. By sec. 690 of the Compiled Laws of 1871, if any person elected to a township office (except that of justice), of whom an oath is required, and who is not exempt by law, shall not qualify within ten days, he is subjected to a penalty of $10. By secs. 691, 693, resignations of officers elected at township meetings must be in writing, addressed to the township board, who are authorized to make temporary appointments to fill vacancies. [The township board is composed of the supervisor, the two justices of the peace whose term of office will soonest expire, and the township clerk, any three

of whom constitute a quorum. Sec. 706.] Resignations of other officers are directed to be made generally to the officer or officers who appointed them, or may be authorized by law to order a special election to fill the vacancy. Sec. 615. These provisions indicate a general intention in conformity with the principles of the common law. They make the acceptance of a township office a duty, and they direct resignations of office generally to be made to those officers who are empowered either to fill the vacancy themselves, or to call an immediate election for that purpose—the controlling object being to provide against the public detriment which would ensue from the continued or prolonged vacancy of a public office. The same intention is manifested by sec. 649, which prescribes the term of office of township officers as follows: "Each of the officers elected at such meetings [that is, the annual meetings of the township] except justices, commissioners of highways, and school inspectors, shall hold his office for one year, and until his successor shall be elected and duly qualified." Here is manifested the same desire to prevent a hiatus in the offices. There is nothing in the spirit of this legislation to indicate that the common-law rule is discarded in Michigan. The 617th section of the Compiled Laws declares that "every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: First, the death of the incumbent; second, his resignation; third, his removal from office; etc., etc." But it is nowhere declared when a resignation shall become complete. This is left to be determined upon general principles. And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent, that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every office holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law.

The plaintiff in error has referred us to several authorities to show that in this country the doctrine that a resignation, to be complete, must be accepted, does not prevail. But whilst this seems to be the rule in some States, it is not the rule in all. In many States the common-law rule continues to prevail. In Hoke v. Henderson, 4 Devereux, 1, 29 decided in 1832, Chief Justice Ruffin, speaking for the Supreme Court of North Carolina, said: "An officer may certainly resign; but without acceptance, his resignation is nothing and he remains in office. It is not true, that an officer is held at the will of either party. It is held at the will of both. Generally, resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."—(p. 29.) Similar views were expressed by Mr. Justice Cowan in 1842, in delivering the opinion of the Supreme Court of New York in Van Orsdall v. Hazard, 3 Hill, 247, 248; and many common-law authorities on the subject were referred to. The Supreme Court of New Jersey maintained the same doctrine in 1864, in an able opinion delivered by the present learned chief justice, in the case of State v. Ferguson, 31 N. J. L. R. 107. Speaking of the officer in question (an overseer of highway), the chief justice said: "If he possess this power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he can not be compelled to accept the office. But the books seem to furnish no warrant for this doctrine. To refuse an office in a public corporation connected with local jurisdiction, was a common-law offense and punishable by indictment." After reviewing the authorities cited to the contrary, particularly that in 1 McLean, 512, the chief justice concludes: "I do not think any of the other cases relied upon on the argument sustain in the least degree the doctrine, but, on the contrary, they all imply that the resignation, to be effectual, must be accepted." In Gates v. Delaware County, 12 Iowa, 405, referred to and much relied on by the plaintiff in error, whilst the court asserts that acceptance is not necessary, it nevertheless finds that there was, in fact, an acceptance in that case. The county judge to whom the superintendent of schools addressed his resignation, indorsed it "Resignation," and filed it in his office of the date specified; which act, under the circumstances, was considered by the court an acceptance. This case, therefore, can not be regarded as definitely settling the doctrine even in Iowa. Much reliance is also placed on the decision of Mr. Justice McLean in the circuit court in United States v. Wright (1McLean, 509), where Wright was sued as surety on a collector's bond for delinquency committed by the collector after he had sent his resignation to the president, but before it was accepted. Justice McLean held that the resignation was complete when received, and that the defendant was not liable. In announcing his decision he used this broad language: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office." Chief Justice Beasley, of New Jersey, in commenting upon this language in State v. Ferguson, already cited, justly observes: "It is hardly to be supposed that it was the intention of the

judge to apply this remark to the class of officers who are elected by the people and whose services are absolutely necessary to carry on local government; or that it was the purpose to brush away with a breath the doctrine of the common law, deeply rooted in public policy, upon the subject. However true the proposition may be as applied to the facts then before the circuit court, it is clearly inconsistent with all previous decisions, if extended over the class of officers where responsibility is the subject of consideration." But conceding that the law in some of the States is as contended for by the plaintiff in error—and he cites cases to this purpose decided in Alahama, Indiana, California and Nevada; and conceding that Justice McLean's decision may have been correct in the particular case before him—the question is, what is the law of Michigan; and we think it has been shown that the common law rule is in force in that State. Now, in the present case, it is true that the defendant in his return avers that he resigned his office on the 7th day of June, 1876. But he does not stop here. He goes on to show precisely what he did do. His whole return on this branch of the subject is as follows: "That, at the general election of April 3, 1876, this respondent was duly elected the supervisor of said township of St. Joseph, and on April 8, 1876, respondent qualified and entered upon his office as such supervisor. That respondent continued in said office of supervisor until the 7th day of June, 1876, when this respondent resigned his office as such supervisor. That such resignation was in writing, of which the following is a true copy: "To the township board of St. Joseph, County of Berrien, and State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7th, 1876. Edward M. Edwards." "That said writing, of which the above is a copy, was signed by this respondent, and after being so signed was by respondent delivered to and filed by the township clerk of said township of St. Joseph. and that said writing was so delivered to and filed by said township clerk on the 7th day of June, 1876. That since said 7th day of June, 1876, this respondent has not been the supervisor of said township of St. Joseph. That he has not acted nor assumed to act as such supervisor in any particular. That respondent has not, since said June 7th, 1876, had charge of any of the records or papers of said office of supervisor."

It does not appear that the resignation was ever acted upon by the township board, or that it was ever presented to or seen by them, or that the board was ever convened after the resignation was filed. Accordtng to the common law rule, the resignation would not be complete, so as to take effect in vacating the office, until it was presented to the township board and either accepted by them or acted upon by making a new appointment. A new appointment would probably be necessary in this case, because the township board was not the original appointing power. The supervisor is not their officer, representative, or appointee. They only represent the township in exercising the power, vested in them, of filling a vacancy when it occurs. This makes them the proper body to receive the resignation, because they are the functionaries whose duty it is to act upon it.

We think, therefore, that the return made to the alternative *mandamus* did not sufficiently show that the defendant had ceased to be supervisor of the township.

Other excuses for not obeying the *mandamus* are propounded in the return, as follows: "Respondent further says that he has never had served upon him, in the cause in which said alternative writ issued, any process, notice or papers of any kind, except said alternative writ. And respondent further shows that the township clerk of said township of St. Joseph has never made and delivered to respondent any certified copy of any statement on file or of record in his office of the moneys to be raised by taxation, either for the purpose of paying the alleged claim of the relator or for any other purposes, and no statement whatever of the clerk of said township with reference to the amount of money to be raised for township purposes has ever been delivered to respondent." The plea of non-service of the writ is inadmissible. The appearance of the defendant and the actual making of the return are a sufficient answer to it. Non-service may be good ground for a motion to set aside a proceeding based upon supposed services, but it is not a good return to the writ. The excuse that the clerk did not deliver to the defendant a certified statement is evasive. Why did he not do so? Was there collusion between them as stated in the petition for *mandamus*? The defendant does not state that the clerk refused to deliver him a statement; nor that he, the defendant, applied to the clerk for one. His own act, in repudiating his office, might well have prevented the clerk from delivering a statement to him. It is to be presumed that, on re-assuming his duties, the clerk will recognize his official character and furnish the requisite statement. But if the clerk should refuse, it would still be the defendant's duty as supervisor to see that the claim of the relator, which is a fixed and indisputable liability of the township, and has been duly presented, is placed before the board of supervisors, and put in the way of payment by means of taxation.

We think the return was insufficient. and the demurrer was well taken. The judgment of the circuit court is, therefore, affirmed.

RIPARIAN RIGHT—SUBTERANEAN PERCOLATING WATERS.

CITY OF EMPORIA v. SODEN.

Supreme Court of Kansas.

1. In actions for injunction, neither party is, as a matter of right, entitled to a jury; and, where the controversy is between an individual and the public, the court is ordinarily guilty of no abuse of discretion in declining to submit questions of fact to a jury.

2. S is the owner of certain mills built on his own land on the banks of the Cottonwood. These mills are propelled exclusively by water power obtained by means of a dam across the river. S purchased, in 1860, the right of flowage of the upper riparian owner, built the dam on his own lands, and has been in quiet and undisturbed possession for nineteen years. In this property he has invested many thousands of dollars. In 1880, the City of Emporia constructed a system of water works, for the purpose of supplying the citizens with water for domestic use, for extinguishing fires and for manufacturing purposes. It purchased a tract of land on the banks of the pond above the dam, dug a well twenty-five feet in diameter and twenty-six feet in depth, on its own land, and from seventy-five to a hundred feet from the bank of the pond. This well draws its supply of water from the pond by percolation through a bed of gravel at the bottom of the well. It sank one pipe into the well, and another it extended directly into the pond. By means of engines and pumps it supplies the citizens from the well with all water needed for ordinary purposes, and intends to use the pipe in the pond only in case of fire. No comdemnation of the water was had, and no compensation made to S. The supply of water in the river is, at certain seasons of the year, inadequate for the running of the mills, and S is then forced to suspend work and let them stand idle. *Held*, that S is entitled to an injunction restraining the city from taking water from the pond either directly through the pipe extending into it, or indirectly by means of the well.

3. While the general doctrine in respect to underground water percolating through the soil is, unquestionably, that the owner of the land may appropriate it to any use, and in any amount, and without reference to the effect of such appropriation upon his neighbor's land or supply of water, yet it is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof.

BREWER, J., delivered the opinion of the court:

This case presents some questions which are new in the history of this State, and upon which, indeed, few authorities can be found anywhere. The facts are these: Soden is the owner of some mills, built on his own land, on the banks of the Cottonwood River. These mills are propelled exlusively by water power. To secure this power Soden erected and maintains a dam, which raises the water some seven or eight feet, and making, above the dam, quite a pond. The mills are of great value, having cost many thousands of dollars. Soden's title to this water power is clear and full. He has used and maintained it for nineteen years. He owns the land upon which the dam is built, and purchased and obtained a conveyance from the upper riparian owner of the right of flowage. This conveyance was executed and recorded in 1860. In 1880, the City of Emporia, a prosperous city of 5,000 inhabitants, constructed a system of water works, for the purpose of supplying its citizens with water, purchased a tract of land adjoining and above the mill property, and extending to the center of the river. On this land, and from seventy-five to a hundred feet from the bank of the river, it dug a well, twenty-five feet in diameter and twenty-six feet in depth. The court found that this well drew its supply of water from the plaintiff's mill pond. Into the well it sank one pipe, and another it ran into the mill pond. The latter, however, it intended to use only in case of fire, depending on the former for the ordinary supply of the city. Soden duly warned the city not to attempt, directly or indirectly, to take water from his mill pond. No condemnation of the water, and no arrangement with Soden, was ever made. Whereupon Soden brought this action, and obtained an injunction in the district court restraining the city from taking water from the pond or well. To reverse such judgment, this proceeding in error has been brought.

With this general statement, we proceed to consider the specific errors alleged. And, first, it is insisted that the court erred in refusing a jury. This was an action of injunction, an equitable action, and neither party had a right to a jury. Of course, in such an action, questions of fact may arise, and the court has power to submit those questions to a jury, but neither party has a right to a jury. Whether one shall be called or not, rests in the discretion of the court. Hixon v. George, 18 Kan. 256; Carlin v. Donnegan, 15 Kan. 496. And generally, in a case like this, we think the wisest course is to refuse a jury. An individual has a dispute with a community. A jury will naturally gravitate towards the majority. Its sympathies are with the many, and against the individual. Then, generally, a court does well in declining to submit questions of fact to a jury, and in assuming the full responsibility of the decision. In this case, it may be remarked, the learned judge is himself a citizen of Emporia. So far as sympathy and interest may affect the judgment, his would naturally be with the city. For eight years he has been the honored and respected judge of that district. Many cases have come to this court from his decisions, and we have had repeated occasions to notice his fairness and candor. We desire to place upon record our unqualified approval of his conduct and ruling in cases like this, where many a weaker and less brave man would have avoided the responsibility which fairly belongs to a judicial office.

The next question to be considered is one of fact, and that is, whether this well draws its supply of water from the mill pond of plaintiff? Of course there are two allegations in the petition, one of the direct abstraction of the water in the

mill pond by the pipe placed in it, and the other of the indirect abstraction by the well. The former, according to the testimony, is to be resorted to only in case of fire; at least, that is the present intention of the city officers. The latter is denied, and, as a question of fact, is to be determined by the evidence. The finding in this respect was against the city, and that the well draws its supply of water from the pond by percolation through a bed of gravel at the bottom. And, upon the testimony, this finding must be sustained. We may have something to say hereafter as to the character of the evidence by which such a fact is sought to be established. For the present, it is enough to say that there was testimony clearly tending to establish it. The proximity of the well to the bank of the pond suggests that the latter is the source of its supply. The rapid rise of water in it—one foot in thirty-seven minutes—confirms this. At the bottom of the well is a stratum of gravel; much appears, also, in the river. In digging the well they found no water till they struck this bed of gravel, and then it flowed in, in streams. The water, as admitted by one of the defendants, rises and falls with the rise and fall of water in the pond. While the pumps ordinarily keep the water in the well below the level of the pond, yet, if they are stopped, it slowly rises to the same level. These are facts which, if they do not compel. certainly justify the finding of the court. It is true that the water reaches the well by percolation through this bed of gravel, and not by flowing in a distinct channel, and the effect of this upon the legal rights of the parties will be considered hereafter. It may be conceded, also, that it is not shown that the pond is the only source of supply to the well. Witnesses speak of water coming in to the well from a direction opposite to that of the river, and it may be that hidden springs, subterranean streams and unknown sources, contribute to the supply.

For the present, and to determine the legal rights of the parties, we shall assume that, in case of fire, the water will be taken directly from the mill pond by means of the pipe running into it, and that generally the supply of water in the pond will be reduced by means of the indirect abstraction through the well, and the subsequent transmission, through the streets of Emporia, for the accommodation of its citizens. Has the plaintiff any remedy for this direct and indirect abstraction of water, and consequent diminution in amount of power? The amount of water now used by the city, and its present effect upon the plaintiff's business, does not determine the question of right or remedy. The continuance of the waterworks, as well as the growth of the city, will increase the demand, and, if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. Now, that the flow of water in the natural channel of a surface stream is a property right of the riparian owner, is unquestioned and familiar law. Shamleffer v. Mill Co., 18 Kan. 24.

If an individual should, by digging a new channel a few hundred feet above Soden's dam, attempt to divert the flow of the stream, beyond doubt he would be restrained. And this restraint would be granted, not because of the mere fact of digging a channel, but because thereby the natural flow of the stream was prevented; not because of the manner, but because of the fact of the diversion. The restraint would be granted as readily if the abstraction was by pipes and pumps, as if by channel and a change of current. The principle is this, that whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property and belongs to the riparian owner, and is protected in law just as fully as the land which he owns. It can not be taken for private use except by his consent, and for public use only upon due compensation.

With these general and conceded principles, let us now inquire as to the validity of the grounds upon which the action of the city is sought to be justified. The fact is obvious that, by means of the pipe running into the pond, there will be, in case of fire, a direct abstraction of water, and the fact is found that, by means of the well, there is an indirect abstraction. The flow of water is, as heretofore stated, thus interfered with and the power diminished. It is in evidence that while, at certain seasons of the year, the water supply is more than enough for all of plaintiff's present uses, and that, during such seasons, the consumption of water in the city would work no present injury; yet, at other seasons, the supply is insufficient, and some, or all, of his mills are compelled to stop running. Hence, naturally, any abstraction of the water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury, an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it until his uses shall wholly exhaust it. So that matters of amount really fade out of sight, and the question is one of right and title.

The city defends its action upon three grounds. First, as to the pipe running into the pond and the water thus taken therefrom, that such use is only intended in cases of fire, and that then "*salus populi suprema lex*" controls. As, in case of fire, the general safety justifies the destruction of one building, to prevent the spread of fire and ruin of all, so such emergency will justify the appropriation of even the entire flow of any river. We do not doubt that emergencies may arise which justify the most extreme measures, and that in such emergencies the individual must suffer for the needs and protection of the public. But it is not every fire that creates such an emergency. An isolated building on fire endangers little or nothing. Yet to save one's barn, whose burning endangers no other building, the city proposes to

take from plaintiff some portion of the power necessary for the running of his mills. Is this not very like robbing Peter to pay Paul? May the city take one man's property to prevent another man's loss? Doubtless the public owes to the individual the duty of reasonable effort to prevent destruction by fire, but such duty does not compel premeditated and uncompensated appropriation of private property. The public may justify the destruction of one building by powder, to save many buildings from destruction by fire; but the possibility of such an emergency will not authorize the public to take possession of every individual's cellar and turn it into a powder magazine, so as to be ready for the emergency.

A second matter of defense is this. While the diminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent, that each riparian owner might, without subjecting himself to liability to any lower riparian owner, use of the water whatever was needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and, whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia might buy land on the banks of the river, and then take for domestic uses whatever amount of water he needed. What the individual separately might do, the city, representing all the individuals, has done. Does the manner in which the result was accomplished make any difference in the right?

This argument is plausible but not sound. A city can not be considered a riparian owner within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes is comparitively trifling. Such use might be tolerated upon the principle *de minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Every one proposing to utilize the power of running water should reasonably expect that the stream was chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water, for the supply of a populous and growing city, stands upon an entirely different basis. No man can foresee this; and if it were tolerated, no one would dare to expend money in utilizing this power, for fear of its being soon taken from him without compensation, and with total loss of his investment. The city, as a corporation, may own land on the banks, and thus, in one sense, be a riparian owner. But this does not make each citizen a riparian owner. and the city is not taking the water for its own domestic purposes. It is not an individual; has no natural wants; it is not taking for its own use, but to supply a multitude of individuals; it takes to sell. Again the statute under which the city is acting, Comp. Laws, 1879, p.997, sec. 1, authorizes the taking of water "for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires and for manufacturing and other purposes." It would be strange if the city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up riva establishments. This same question was before the Supreme Court of Alabama, and in a well considered case the same conclusion was reached. We quote from the opinion in that case: "It is insisted, however, that the fact that the city of Mobile owned land on the creek, upon the point where the mill of the defendant in error was located, gave to that corporation the right to the use of the water in sufficient quantities to supply the domestic purposes of its inhabitants. That a riparian proprietor has the right to consume even the whole water of a stream if absolutely necessary for the wants of himself and family, has received the sanction of judicial decision. Evans v. Merriweather, 3 Scam. 496; Arnold v. Foot, 12 Wend. 330; but if this doctrine be correct, it can have no application in the present instance, because it rests upon reasons which are wholly inapplicable to corporations, which are artificial bodies, and can have no natural wants. There are, however, other considerations which would forbid the extension of this rule to the case before us. The city of Mobile is not located upon the creek; it is from three to five miles distant. To hold that a municipal corporation can, from the mere fact of owning land upon a water course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants, residing at a distance of from three to five miles, to the injury of other proprietors, would be unreasonable in itself, and unjust to those who have an equal right to participate in the benefits of the stream." Stein v. Burden, 24 Ala. 130. See also Garwood v. New York, etc. R. Co., Ct. of Appeals, N. Y. 23 Alb. L. J. p. 215.

A final matter, applicable solely to the well, and the most serious and difficult question in the case is, that as the water enters only by percolation through the soil, the law will permit no inquiry into the sources of supply or the effect of such percolation upon the quantity of water in any other tract of land. It is doubtless true, as a general proposition, that the law takes no cognizance of percolating water. The impossibility of proving, with reasonable certainty, the sources of supply is a strong, if not the principal, reason therefor. But upon whatever founded, the doctrine may be considered settled. Chief Justice Chapman, in delivering the opinion of the court in the case of Wilson v. New Bedford, 108 Mass. 265, says: "The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it; therefore, he may dig a well, and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which

would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land." See also the following cases: Acton v. Bluddell, 12 M. & W. 352; Chasemore v. Richards, 7 H. L. Cas. 349; Wheatley v. Baugh, 25 Pa. St. 528; Ellis v. Duncan, 21 Barb. 230; Greenleaf v. Francis, 18 Pick. 117; Brown v. Illins, 27 Conn. 84; Chase v. Silverton, 62 Me. 175; Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294; Roath v. Driscoll, 20 Conn. 533. Does this case furnish an exception to or limitation upon this doctrine?

It is also a general proposition, that a man may not do indirectly what he may not do directly. Unquestionably, a party might not run pipes into plaintiff's mill pond, or dig a channel to it and thus divert the water. May he accomplish the same result by digging a well upon the very banks and so near thereto that the water oozes out from the pond into the well and be beyond the reach of the law, so long as he keeps a wall of earth between the well and the pond. If this were recognized as law, protection to the owners of water power would rest on slender foundations. Often the banks of a stream are composed of very porous soil, or it may be there is, as in this case, a bed of gravel through which the water runs as through a sieve. Is the owner of the pond then at the mercy of any one who, avoiding the more direct and public method of pipe or channel, resorts to equally effective means of adjacent wells? And if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could in justice be given—that the owner of an established power was entitled to protection against any subtraction therefrom, whether sought to be accomplished by direct or indirect methods. We are aware that the further the well is removed from the bank of the stream, the more difficult and uncertain the evidence of the abstraction of the water; but when the fact of the abstraction is proved, it would seem that relief must necessarily follow. It is a matter of common knowledge that water, passing through but a narrow passage and finding at the end an outlet, soon increases by its flow the size of the passage, and thus that which at first was but a mere trickle, becomes in time a sizable stream, and the abstraction which at first is limited soon increases, until it may eventuate in a general exhaustion. Of course, the mere proximity of the well to the stream does not prove the abstraction—there may be other and subterranean sources of supply—and he who alleges the abstraction has the burden of proof; and if he fails to establish the fact, fails to show a right to relief, and if he asks compensation for the abstraction, can recover only for the amount he is able to prove. Here the fact is found, and upon that finding plaintiff is entitled to relief.

Authorities, as was stated in the outset of this opinion, are few, but those most directly in point sustain the views we have expressed. The case of Dickinson v. Canal Co., 7 Exch. 280, was decided in 1852. In this case it appeared that defendant had dug a well out of which it pumped water to supply its canal. The effect of this was to intercept water which theretofore percolated through the ground into the River Bulbourne, and also to abstract from said river a portion of the water which had already entered into and become a part of the stream. The plaintiffs, the owners of certain mills propelled by the water power of said river, brought their action, and it was held maintainable on both grounds. In 1859 the case of Chasemore v. Richards was decided in the House of Lords. 7 House of Lords Cases, 348. This case overrules Dickinson v. Canal Co., so far as respects the interception of water percolating towards and into the stream, but leaves unquestioned the other ground, that of the abstraction of water from a natural stream. The facts were these. Plaintiff was the owner of a mill propelled by the water power of the River Wandle. The defendant, for the purpose of suppiying the town of Croydon with water, dug a large well on ground belonging to the town, and about a quarter of a mile from the river. Out of this from 500,000 to 600,000 gallons were daily pumped. The effect of this was to intercept underground water in the vicinity of the well which theretofore had percolated through the soil towards and into the River Wandle, and thus diminished the supply of water and amount of power in the river. It was held that the action could not be maintained. The opinions announced in that case, and five are reported, are interesting and instructive. All concurred in the judgment, though Lord Wensleydale evidently did so with reluctance. All rest upon the general thought that there is so much uncertainty as to the direction and flow of underground water, which has not assumed the form of a distinct definite subterranean stream, that to attempt to apply the settled law as to surface streams would cause great confusions, tend to prevent drainage and improvement of lands. There is in some of the opinions a distinct concession that no natural definite stream, surface or subterranean, can be interfered with. The chancellor, Lord Chelmsford, says: "I agree with the observation of Lord Ch. Baron Pollock in Dickinson v. Grand Junction Canal Co., that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover, had the stream been wholly above ground." And certainly nowhere in the case is any attempt made to deny protection to any established and definite natural stream against the abstraction, direct or indirect, of its waters. In the subsequent case of Grand Junc-

tion Canal Co. v. Shegar, reported in 6 Chancery Ap. Cases, 487, it appeared that a local board of health had by its drains drawn off a subterranean spring, and also water from a running stream. In sustaining an injunction Lord Hatherly said: "I do not think Chasemore v. Richards has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground, but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you can not get at the underground water without touching the water in a defined surface channel, I think you can not get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in the defined channel, because that is not only for yourself, but for your neighbors also, who can have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity."

The three cases of Bailey v. Woburn, 125 Mass. 416; Astua Mills v. Walthan, 126 Mass. 422, and Astua Mills v. Brookline, 127 Mass.69, are instructive. In each of these cases the town had constructed a water gallery near the banks of the river. In the first case it appeared that connection between the gallery and the river was made by pipes and conduits; in the second, the water passed into the gallery through an artificial embankment, while in the third it simply passed in by percolation through the natural soil. In each case this was adjudged a taking of the water of the river, for which damages could be recovered under the statute. In the last case the court notices the distinction between appropriating by well or otherwise that which is merely underground and percolating water, and diverting from a natural stream by means of an adjacent well, and clearly intimate that the last can not be permitted.

In the case of the village of Delhi v. Youmans, 45 N. Y. 362, the defendant dug a well on his own land, whereby water was drawn away from plaintiff's land. Peckham, J., for the court says: "If the action of the defendant took the water away from the springs after it had reached there, after it had become part of an open running stream, then this action would lie."

In Pixley v. Clark, 35 N. Y. 520, a different question was presented, but one which shows that the percolation of water may be the subject of judicial inquiry, notwithstanding the difficulties in the matter of proof. In that case the defendant built a dam across a stream, which raised the water so that it percolated through the natural bank and saturated an adjacent field, and it was held that he was liable for the damages. See also Rawstron v. Taylor, 33 Eng. L. & Eq. 428; Broadbent v. Ramsbotham, 34 Eng. L.& Eq. 555; Goddard on Easements, 248; Washburn on Easements, 449; Dexter v. Providence, Aq. Co., 1 Story, 387; C. S. M. Co. v. V. & G. H. W. Co., 1 Sawyer, 470; Basset v. Salisbury Manf. Co.,43 N. H. 559; Wheatley v. Baugh, 25 Pa. St. 528; Whetstone v. Bowser, 29 Pa. St. 59.

Our conclusion then is that the judgment of the district court was correct and must be sustained. Before the city can destroy or diminish the water power of Mr. Soden, it must make compensation. We think the statute under which the city was proceeding broad enough to include the condemnation of water, so that, if the parties can not agree, proceedings may be had for a condemnation, and in such proceedings plaintiff can recover compensation for such injuries as he is able to prove.

The judgment will be affirmed. All the justices concurring.

CONTRACT— WAGER—STOCK SPECULATION.

SMITH v. THOMAS.

Supreme Court of Pennsylvania.

A contract to purchase shares of stock without the intention to deliver or receive them is a gambling contract.

Error to the Court of Common Pleas, No. 4, of Philadelphia County.

This was a suit in assumpsit, arising out of an alleged transaction in stocks, by John J. Thomas against John B. Dickson. The death of defendant was suggested on the record on February 19, 1878, and his executor, Lewis Waln Smith, was substituted as the party defendant. The suit was first brought in Common Pleas, No. 1. It was tried there once, verdict for plaintiff, new trial granted, and then discontinued in that court and brought in Common Pleas, No. 4, on May 5, 1877. On November 11, 1878, a new trial was obtained for plaintiff. On July 5, 1879, a new trial was granted by Thayer, P. J. On October 27, 1880, the case was tried again before Briggs, J., and plaintiff obtained a verdict. Defendant then took out a writ of error to the Supreme Court, assigning as error:

1. The learned judge erred in declining to affirm the defendant's first point, viz: "The evidence of the plaintiff, showing as it does, that he acted as the agent of the defendant in the transaction sued on, and that the understanding between them was that there was to be no delivery of the stock sold, but merely a settlement of differences, there can be no recovery in this suit, and your verdict must be for the defendant."

2. The learned judge erred in declining to affirm the defendant's second point, viz.: "Under the evidence your verdict must be for the defendant."

3. The learned judge erred in admitting in evidence the book of the plaintiff as a book of orig-

inal entries, to prove the sale of the stock. And in charging thereon as follows, viz.: "Mr. Thomas has laid before you his book containing this entry. You may look at it to discover whether it appears in its regular place, according to fair journalizing, as it appears upon the book; whether it is sandwiched or interlined; whether it appears on that day with other transactions; whether the date corresponds; whether it bears the impress of fairness and regularity. Here are the books of original entries, and here are the various statements made by him. Are they true or are they false?" And after so commenting, allowing the jury to take the said books out with them.

4. The learned judge erred in not leaving to the jury the question as to whether or not there had ever been a delivery of the stock in dispute, but instructing them: "If it, the settlement, was ratified by the plaintiff by practical performance in accordance with the rules and regulations established by the clearing-house of which he was a member, then the delivery is just as effectual as though the stock had been delivered in bulk, or the certificates had been received and they handed over."

"Therefore, if you find in this case that this sale was made in good faith, and the delivery made by the plaintiff in accordance with clearing-house regulations, you may assume that the deliveries were according to law."

5. The learned judge erred in charging the jury as follows: "Therefore, in considering this latter point of defense set up, if you find that Mr. Dickson authorized Mr. Thomas to sell this stock for his account at seller's option (fifteen) without informing him that it was to be settled for in differences, and without informing him that it was merely a matter of gambling speculation, the plaintiff may recover. If, however, he communicated to him at the time, or it was known to him at the time, and if the evidence satisfies you that Mr. Thomas knew it was a stock-gambling operation, that no stock was to be delivered to him, but the whole transaction at the end of the time, or whenever it was closed, was to be settled in differences, it not being indicated at the time that any stock was to be delivered by him, or any stock was to be delivered by the broker, who made this short sale, then it is what the law stamps as a gambling transaction, and the defendant would be entitled to your verdict."

And refusing to so modify the above charge as to say that if the "understanding" between the parties was, that there was to be no delivery of the stock, but only a settlement of differences, the verdict must be for the defendant.

6. The learned judge erred in commenting favorably on the overruled opinion of the president judge of his court. And in criticising unfavorably to the jury the decision of the Supreme Court in Fariera v. Gabell, saying; "That was his (Judge Thayer's) view at the time, and I am sure that, after all, it will not be declared to be the law, for the case that went to the Supreme Court was very obscure." And, by his language, leaving an impression on the minds of the jurors that the decision of the Supreme Court was doubtful law.

7. The learned judge erred in the whole of his charge, the tendency of which was to favor the claim of the plaintiff as a contract proved and as a legal contract.

Hon. Benjamin Harris Brewster, for plaintiff in error; *Contra*, *Thomas J. Diehl*.

GORDON, J., delivered the opinion of the court:

An inspection of the evidence of the plaintiff, will, of itself, reveal the fact that there was a mistrial of this case in the court below.

Thomas swears that he sold for Dickson 500 shares of Pennsylvania Railroad stock, short, and this Thomas further on explains by saying that, at the time he professed to sell this stock, he had no such stock in his hands to sell. Nevertheless, he says when he sold these 500 shares, he delivered them. This anomalous kind of testimony he explains by saying that this delivery was made on the clearing-house sheet, which means a mere settlement of differences. It appears also from this same testimony that, in order properly to keep up appearances, when the time came for delivery, he had to borrow 500 shares of stock from somebody, whose name does not appear, and of these there was no actual delivery, but, as the witness says, it came through the clearing-house sheet. All this means, in common parlance, that Thomas sold for Dickson 500 shares of stock, which Dickson, at that time, neither had nor intended to have, and that under the pretense of meeting this contract when it fell due, Thomas pretended to borrow 500 shares which were not delivered to him; that this altogether fictitious transaction was accomplished through the agency of the clearing-house, and was one in which no other parties were known but Thomas and Dickson, who were to account to each other for differences only.

In order to show that in this we are not mistaken, and that the confirmation may proceed from the plaintiff's own mouth, we subjoin the following evidence, to-wit: "Q.—Did not you, upon a former trial in this case, say, and have you not said it twice, we only pay the difference or receive the difference; we do not actually deliver the stock? A.—That is, for our clearing-house certificate balances, we only pay the difference or receive the difference. If we have something coming in on one side that is going out on the other, of course we merely pay the difference. Q.—Did you act as a broker for Mr. Dickson in that sense? A.—Did I act as a broker? Yes, sir. Q.—When you and the defendant, Mr. Dickson, had this understanding, as you have explained it, was it not understood by you and the defendant that there would be no actual delivery of the stock by you to him or by him to you, but that he was to receive the difference from you, in case the price of stock went down, or was to pay the

difference to you in case the price went up? A.—Yes, sir. Q.—That is, if there was any loss he was to pay? A.—Yes, sir. Q.—And if there was any profit he was to hand it over to you? A.—Yes, sir." Again, further on: "Q.—Have you not testified that at the time Mr. Dickson directed you to sell this stock, that it was understood between you and him that there was to be no actual delivery of the stock by you to him or by him to you, but that he was to protect you from loss if the stock went up, and that he was to receive the difference from you in final settlement if the stock went down; did you not say that? A.—That certainly was the understanding."

Confessedly, then, this was a dealing in differences or margins, a wagering contract, and, therefore, utterly void.

There was here no question as to a *bona fide* time contract upon which the jury was called to pass; neither does it involve, as the court below erroneously imagined, the question of agency, for there were but two parties who were mutually engaged in stock jobbing, and who were to settle with each other, and not with some third party. Moreover, we are somewhat surprised that the learned judge who tried this case should have regarded the recent decisions of this court upon this subject, as not only novel, but doubtful. We can assure him that they are obnoxious to neither of these charges.

As early as Pritchet v. Insurance Company of North America, 3 Yeates, 458, it was ruled that while the British Statute of 19 Geo. II, c. 37, did not bind us *proprio vigore*, yet that system of national policy which aimed at the suppression of wagering policies, had, even at that period, been adopted by our courts. And in Edgell v. McLaughlin, 6 Whart. 176, it was said by Mr. Justice Sergeant, that it was fortunate for Pennsylvania that there was in its highest tribunal no decision favorable to the recovery of a wager, and that the only decision then existing upon the subject was expressly in point to the contrary. Between this case and that of Brua's Appeal, 5 P. F. Smith, 299, we have very many decisions condemnatory of wagering contracts, in the way of betting on horse races, elections, etc., etc.

Brua's Appeal is in point, however, upon the very question in controversy. It was there held that a contract to purchase shares of stock without the intention to deliver or receive them was a gaming contract. Mr. Justice Thompson, who delivered the opinion in that case, made use of the following words: "It is said the form in which this contract appears enters largely into the business of stock brokerage; this is a mistake; the *bona fide* purchase of stocks, no doubt, can be conducted in a legitimate way, and is so, generally, without trenching in the least on the gamblers' province. If this be possible, however, the fewer licenses that are issued for such a business, the better. Anything which induces men to risk their money or property, without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called." Then we have Smith v. Bouvier, 20 P. F. Smith, 325, in which Brua's Appeal is approved, and the distinction noted between *bona fide* time contracts and those of a purely wagering character. Next in order comes Fareira v. Gabell, 8 Norris, 89, in weich we have a *per curiam* opinion, adopting the very clear and satisfactory opinion of Judge Hare of the court below, and approving Smith v. Bouvier and Brua's Appeal. Tken comes North v. Phillips, 8 Norris, 250; Gheen, Morgan & Co. v. Johnsou, 9 Id. 38, and, last of all, Ruchizky v. De Haven, but recently delivered.

It is thus manifest that, contrary to what the learned judge supposed, the doctrine is neither doubtful nor new. On the other hand, it is both old and well established.

Furthermore, he is entirely mistaken in his supposition, that, on this subject, there is a want of harmony between our courts and those of Great Britain. This very same doctrine was held in Grizewood v. Blane, 2 J. Scott, 11 C. B. 526. A case which exhibits the ready disposition of the British courts to follow the leading of their own statute 8 and 9 Vict., 109, upon this subject. Jarvis, C. J., left the question to the jury to say, "whether either party meant to purchase or sell the shares in question," telling them, if they did not, the contract was, in his opinion, a gambling transaction, and void. On a motion afterwards for a new trial, the opinion of the chief justice was sustained. Justice Cresswell, among other of the judges, saying: "As to the evidence, I think it abundantly warranted the jury in coming to the conclusion that there was no real contract of sale, but that the whole thing was to be settled by the payment of differences. It clearly was a gambling transaction within the meaning of the statute."

Now, the only real difference between this case and the one in hand is this, that in the case cited, there was something to submit to a jury, whilst in the one now under consideration there was nothing so to submit; the plaintiff himself, by his own testimony, having stamped the transaction with the brand of illegality.

Of the remaining exceptions, it is unnecessary for us to speak, since what has already been said effectually disposes of this case.

Judgment reversed.

ABSTRACTS OF RECENT DECISION.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

MANDAMUS—THE WRIT WILL NOT LIE, WHERE OTHER REMEDIES ARE COMPLETE.—This is a petition for a writ of *mandamus* to compel the Circuit Court of the United States for the Northern District of Illinois to hear and determine, whether a master of the court shall execute to the relator a deed for certain lands bought under a sale ordered by that court. It nowhere appears from the relator's own showing that the court has expressly refused such an order. The court has refused leave to file a certain petition in the suit, and it has refused an order on the master to show cause why he should not make such a deed. From the whole case, as presented by the parties, we infer that the court below, as constituted when the application was made, thought the deed ought not to be executed, and it is possible the order now complained of may be the equivalent of a final decree in the cause to that effect, from which an appeal to this court may be taken. But whether that be so or not, we will presume the court below will not hesitate, on a proper application, to put the record in a shape to enable us to pass on that question in the ordinary course of proceeding to obtain our review. *Mandamus* can only be resorted to when other remedies fail. It is an extraordinary writ, and should only be used on extraordinary occasions. Here the parties have ample remedy by appeal, if they put their case in a condition for such a form of proceeding. As the relator presents his case on this application, he must avail himself of that remedy. We can not, under the facts he states, expedite the determination of his cause by *mandamus*. The application is consequently denied. Opinion by Mr. Chief Justice WAITE.—*Ex parte Connecticut Mutual Life Ins. Co.*

MORTGAGE—ANTECEDENT INDEBTEDNESS AS A CONSIDERATION—PRIORITY—COSTS.—By the decision in this case we held, that in the distribution of the surplus moneys in court, the claim of McCormick should be paid before that of the bank. He took his mortgage without notice of the one to the bank, which had not been registered. The bank now asks a rehearing of the case on this point, contending that, under the decisions of the New York courts, the priority of its mortgage can not be displaced. It cites the statute of the State to show that the recording act gives priority only to the mortgage first recorded, when that is executed for a valuable consideration, which, according to those decisions, means some new consideration advanced at the time; and that a mortgage for a pre-existing indebtedness is not protected by a prior record, against a non-recorded mortgage for value. Here the mortgage to McCormick was given to secure—to the extent of $1,500—a previous liability and indebtedness, and such as might be subsequently incurred. The previous indebtedness at the time equaled the whole amount of the intended security. There would be force in the position of the bank, if its own mortgage stood in any better condition. When the McCormick mortgage was executed—September 16, 1872—the indebtedness of Whitney to the bank was paid and his mortgage remained in force only for any future indebtedness which he might incur. For such future indebtedness it could not cut out the mortgage to McCormick, executed for an existing indebtedness, and of which mortgage the bank had notice. For advances afterwards made, the mortgage to the bank was a subsequent incumbrance. As between two mortgages—one for a past indebtedness, and one for an indebtedness to be subsequently incurred—the one for the past indebtedness must have precedence if first recorded. The petition for a rehearing by the bank must, therefore, be denied.

The petition of McCormick to be allowed costs out of the fund in court must, according to the usual practice of the court in such cases, be also denied. His costs are chargeable against the bank which contested his right to be paid out of the proceeds in court. If paid out of the fund, they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney. Mr. Justice Swayne heard the argument of this cause and participated in its decision. The judgment will, therefore, be entered as of the date when he was on the bench after the decision was reached in consultation. Rehearing denied; and ordered that judgment be entered as of the second Monday of January last. In error to the Supreme Court of the State of New York Opinion by Mr. Justice FIELD.—*National Bank of Genessee v. Whitney.*

APPELLATE PROCEDURE IN ADMIRALTY—CONTENTS OF TRANSCRIPT.—Motion to strike from the transcript the depositions and oral testimony taken in the progress of the cause in the several courts below. Sec. 698 of the Revised Statutes provides that, upon the appeal of any cause of admiralty and maritime jurisdiction, a transcript of the record shall be transmitted to this court, "and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal." While the act of February 16, 1875, 18 Stat., pt. 3, 315, chap. 77, sec. 1, limits the review by this court of the judgments and decrees on the instance side of courts of admiralty and maritime jurisdiction to the questions of law arising on the record, and to such rulings of the court below excepted to at the time, as may be presented by a bill of exceptions, and requires the court below to find the facts, no change has been made in the law prescribing what should be included in the transcript sent here on an appeal. For that reason we will not order the testimony which has been sent up in this case to be stricken out. As under our repeated decisions (The Abbotsford, 98 U. S. 440,

and The Benefactor at this term), the facts as found are conclusive on us, it is clear the testimony may not be "necessary on the hearing of the appeal." For this reason it may with propriety, by consent of counsel, be omitted from the printed record. We will not, however, make any order in that behalf, but if it shall be unnecessarily printed against the wishes of either of the parties, we will, on the final determination of the case, give such directions in respect to costs as may seem proper. The section of the Revised Statutes referred to, however, requires only copies of such of the proofs to be sent up "as may be necessary on the hearing of the appeal." This gives us power to prescribe by rule what shall be done in cases where the act of 1875 applies. For the guidance hereafter of parties appealing, and the officers of the courts below in such a case, we, therefore, now promulgate the following as an additional paragraph, numbered 6, to Rule 8. "6. The record in causes of admiralty and maritime jurisdiction, where under the requirements of law the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, and findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case." Appeal from the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAIT.—*Marshall v. Str. Adriatic.*

SUPREME COURT OF ILLINOIS.

June, 1881.

GUARANTY—TRUSTEE'S SALE WITHOUT AUTHORITY.—1. Where a party guarantied the payment of a promissory note and coupons before its delivery, the note running for five years, with interest payable semi-annually, but containing a clause that if default should be made in the payment of principal or interest, or any part thereof, for the space of ten days, then on the election of the holder, the whole note and all arrears of interest should become due, and the whole was declared due for default in the payment of interest, and the guarantor, who was also trustee in a deed of trust given to secure the note, was authorized to sell the mortgaged premises for the full amount of the debt, which he did, but struck the property off to the creditor without any authority to do so, which deed the creditor refused to accept, and assigned the note to the plaintiff, who brought suit in his name upon the guaranty: *Held*, that the plaintiff was entitled to recover on the guaranty. 2. Where the creditor, in a deed of trust, directed the trustee to sell for the entire debt due, but sends no bid, or authorizes any to be made for him, a bid by the trustee in the creditor's name is without authority, and the making and recording of a deed for the property to the creditor will not affect his rights, if he does not accept the deed, and no title will pass. Reversed. Opinion by DICKEY, J.—*Ellsworth v. Harmon.*

DECEIT—FRAUD—SCIENTER.—1. In order to support an action for deceit, it must appear that the misrepresentation complained of was a material one. 2. Nor will the action lie, if the plaintiff has omitted to exercise ordinary care to guard against deception and fraud, except where he was led to do so by the other party. 3. The fraud and the *scienter* constitute the grounds of the action. A knowledge of the falsity of the representations must rest with the party making them, and he must use means to deceive. Reversed. Opinion by CRAIG, J.—*Schwabacker v. Biddle.*

NEGLIGENCE — STANDARD OF CARE TO BE TAKEN ON PART OF PLAINTIFF—EVIDENCE—CONSTITUTIONAL LIMITATION OF CORPORATE INDEBTEDNESS, NOT APPLICABLE TO LIABILITY FOR TORTS.—1. In an action by a young lady to recover damages for an injury based upon the negligence of the defendant, involving the question of the plaintiff's freedom from negligence instructions which do not refer as a standard of caution to "what ordinary young ladies would do," but to the conduct of "an ordinarily prudent person," and of "a woman of common or ordinary prudence," are not faulty in respect to the standard referred to. 2. In a suit by a young lady against a city to recover damages for injury to the womb or uterus, caused by a fall from a defective sidewalk, the defendant proved that she did not take proper care of herself after the injury, by remaining quiet, as showing negligence on her part, increasing the injury. On cross-examination of the physicians called by the defense, the plaintiff proved, over defendant's objection, that an unmarried woman, not posted in the anatomy of the womb, could not be expected to act as promptly and intelligently as one understanding it, or as a medical man would; and that it was a common thing for women to suffer from a displacement or injury of the organ spoken of, without themselves knowing the trouble: *Held*, that there was no error in allowing the evidence. 3. In an action on the case against a city to recover for a personal injury growing out of negligence on the part of the city, it can not raise the question that it is already indebted to an amount in excess of the constitutional limitation. 4. There is no error in refusing an instruction, when another one given fully expresses the law expressed in the one refused. Affirmed. Opinion by DICKEY, J.—*Bloomington v. Perdue.*

QUERIES AND ANSWERS.

QUERIES.

3. A, of Alabama, held a mortgage from B, of Alabama, on land in another State. A foreclosed the mortgage, sold the land for what it would bring, and credited the same on the mortgage debt (a note) before the debt was barred by the statute of limitations of six years in Alabama. The proceeds of land-sale not being sufficient to pay the debt in full, suit was instituted in Alabama by A against B on the note. B pleaded the statute of limitations of six years. There was no personal service, or appearance in person, or by attorney, on the part of B in the foreclosure, and he can, therefore, plead the statute of limitations, as the foreign judgment would not be conclusive. The mortgage note, or debt, is barred, unless the payment under the foreclosure suit before the six years elapsed, is a sufficient payment to take the case out of the statute. Was the payment of the proceeds of the mortgage sale, sufficient to prevent the bar of the statute?

Eufaula, Ala. G.

4. Lands which have become encumbered with taxes, and which belong to heirs at law of one and the same ancestor, part of whom are minors, or *feme coverts*, and who have a statutory right to redeem, after the disability of infancy or coverture has ceased. 1st. Can such minors, or *feme coverts*, before or after the cessation of such disability, redeem all the interest in such lands, so as to disencumber the entire interest in the land, and thereby restore the interest of those having attained their majority, and who had let their opportunity slip of redeeming? 2nd. And will rents and profits of the party purchasing at a tax sale, and who has been occupying and enjoying such lands, be offset against the necessary redemption money required under the statute? S.

Powhatan, Ark.

5. On the 1st day of January, 1881, A and B were partners. On that day the partnership was dissolved, and A assigned all his interest in the partnership property to B. In April, an action was brought in the partnership name against C, to recover a debt due the former partnership, and assigned to B. Can the action be maintained? If so, can judgment be rendered in the action in favor of B, under sec. 264, chap. 66, General Statutes of Minnesota of 1878? "Judgment may be given for or against one or more of several plaintiffs * * * * and it may, when the justice of the case requires it, determine the ultimate right of the parties on each side as between themselves."

C. & E.

Le Sueur, Minn.

6. The Constitution of Oregon, art. 4, sec. 18, provides: " * * * * bills for raising revenue shall originate in the house of representatives." A similar provision is to be found in the Constitution of a majority of the States. Has it received a judicial construction? Please cite authorities. S.

Albany, Oregon.

NOTES.

——We copy the following (which is but a small part thereof) from the preface to a work on Pleading, by William Rastell, published in 1534, and in the library of O. W. Aldrich, Esq., of this city: "Thys Boke entituled a collection of entrees, cotaineth the forme & maner of good pleading, which is a greate parte of the cuning of the lawe of Englande, as the right worfhipful and great learned man Syr Thomas Litleton Knight, fomtime one of the Iuftices of the comon place, in hys third boke of tenures, in the chapiter of confirmation, faith to hys fonne in thefe words following: * * In this boke is cotained not onely the practife of the lawe as the forme of declaration and proces, the forme of pleading of barres, replications, & joininge of iffues, & the forme of entrees of verdits, iugements, executions and diuers other matters, but alfo many cunning matters confifting in the fpeculation of the lawe in what cafe the action lieth, for who or against whom it lieth, whe and where it fhal be fued and manye other matters of greate conninge. And in thys booke be also diueres iugements vppon demurrers, & vppon writtes of error, wherein the knowledge of the lawe in these points may be fully feene. And vnderstand *thys*, good reader, that all the notes & referments, and all that is in freche in thys booke & all the wordes in the margent, be mine and of my ftudie." We can not imagine why the fellow wrote book "boke" in one place and "booke" in another; why he spells "all," with one "l" in one place and with two in another, or why he spells cunning in three different ways: "cuning," "cunning," and "conninge," or why he has so great contempt for the Gauls as to call their *clish maclaver, freche*. The Queen's English was a wonderful language in those days.—*Ohio Law Journal.*

——It appears strange that as late as the year 1850, the statute of Vermont authorized the office of constable to be sold at public auction to the highest bidder of the town, and a collectable note could be given for the amount of the bid. But while the statute still existed, the Supreme Court spoke of it in the most uncomplimentary terms, declaring it to be more corrupting and demoralizing than even occult measures for procuring office would be. Thetford v. Hubbard, 22 Vt. 446. Vermont's neighbor, New Hampshire, as early as 1823, repudiated this method of obtaining constables, because "personal merit ought to be the sole passport to office;" Meredith v. Ladd, 2 N. H. 518; but ten years later, in 1833, the court was called on to condemn the "practice" of setting up the collector's office at vendue, to be knocked off to the lowest bidder. Cardigan v. Page, 5 N. H. 182. It is well that all such "practices" have ceased, except, we believe, in some States still, the "poor house"—where the outcasts "whom nobody owns" are thrust as a matter of sympathy—with its inmates and farm, is let out at auction, so that, as a legitimate consequence, the public now and then, are regaled by accounts of fiendish barbarities inflicted on the unfortunates by the venal wretches who manage the "job,' of dispensing the people's "charities."